PARTICIPANT EVALUATION

Michigan Felony Sentencing Law Update
Thursday, August 7, 2014
PETOSKEY, MI

1. Overall, I thought that the program was:

   Poor ☐ Fair ☐ Good ☐ Very Good ☐ Excellent ☐

2. To what degree will the information be helpful to you in your job?

   Not helpful ☐ Some Help ☐ Very Helpful ☐

3. Was the program what you expected it to be?

   Not at all ☐ Somewhat ☐ As Expected ☐

4. How would you rate the overall effectiveness of the instructor?

Name of Instructor	Poor	Fair	Good	Very Good	Excellent
JACQUELINE McCANN					

5. Were there any parts of the program you would change? If so please specify.

6. Other comments regarding this program:

7. What other kinds of in-service training would you like to have available?

Michigan Felony Sentencing Law Update

Jacqueline McCann

Assistant Defender, State Appellate Defender Office
Principal Author, *Defender Plea, Sentencing & Post-Conviction Book*

Jacqueline J. McCann is the current author of the Defender Sentencing Book & the Defender Sentencing Guidelines Manual Annotated. She has been an Assistant Defender for over 10 years with the State Appellate Defender Office. Her extensive experience on appeals, particularly sentencing issues, comes from having argued hundreds of cases in the Michigan Court of Appeals and numerous cases in the Michigan Supreme Court. She has argued several cases about the interpretation of the statutory sentencing guidelines, including *People v. Peltola*, 489 Mich. 174 (2011), *People v. Francisco*, 474 Mich. 82 (2006), and *People v. Smith*, 482 Mich. 292 (2008).

Thursday, August 7, 2014

9:30 a.m. – 11:30 a.m.

Auxiliary Courtroom – Emmet County Building
200 Division Street
Petoskey, Michigan 49770

Presented by the Criminal Defense Resource Center of the State Appellate Defender Office and supported through a generous grant from the Michigan Commission on Law Enforcement Standards

MICHIGAN FELONY SENTENCING LAW UPDATE

August 2014

By Jacqueline J. McCann[1]

Juvenile Lifers and the Application of Miller v Alabama

Legal background:

The Eighth Amendment forbids a *mandatory* sentence of life in prison without possibility of parole for a juvenile offender (under **age 18** at time of offense). *Miller v Alabama*, 567 US __; 132 S Ct 2455 (2012).

Prospective application:

In the immediate aftermath of *Miller*, the Michigan Court of Appeals held that while sentencing judges can no longer automatically impose life without parole on juvenile offenders under the *Miller v Alabama* ruling, Michigan law only gives judges sentencing a juvenile convicted as an adult for a first-degree murder conviction two choices: life with the possibility of parole or life without the possibility of parole. *People v Eliason*, 300 Mich App 293 (2013); see also *People v Carp*, 298 Mich App 472 (2012).

The Legislature responded to *Miller* by passing MCL 769.25 and MCL 769.25a, effective 3/4/14. Pursuant to MCL 769.25, absent a motion by the prosecutor seeking a sentence of life without parole, the court must sentence the defendant to prison for a minimum term between 25 years and 40 years and a maximum term of not less than 60 years. If the prosecutor files a motion seeking a sentence of LWOP within 21 days after conviction, the sentencing court must conduct a hearing as part of the sentencing process and consider the factors listed in *Miller*. If the court chooses not to sentence to LWOP the court must sentence the defendant to a term of years as previously indicated (min between 25 y – 40 and max of at least 60 y).

Retroactive application:

Pursuant to MCL 769.25a, the Legislature decreed that MCL 769.25 would not be applied retroactively unless the state supreme court or the US Supreme court held that *Miller* is retroactive. The Legislature also put in place procedures to be followed in the event that a supreme court held that *Miller* is retroactive, including that a provision that if the prosecutor does not file a motion for resentencing within 6 months of the retroactivity decision then the sentencing court shall resentence the defendant to a term of years as provided in MCL 769.25.

The Michigan Supreme Court ruled that *Miller* is not retroactive in *People v Carp*, ___ Mich ___ (July 8, 2014), in a 4-3 decision. It is expected that Defendant Carp will be seeking relief in the federal courts.

[1] Some summaries authored by Anne M. Yantus and/or Sheila Robertson Deming

When does an Individual Reach Age 18?:

The question is more complex that it appears. In *People v Woolfolk*, 304 Mich App 450 (2014), the defendant killed a man on the evening before the defendant's 18th birthday and the prosecutor argued that he was subject to *mandatory* LWOP. The Court of Appeals had to choose between the common law calculation of age (a person attains a given age on the first moment of the day *before* the anniversary date of his or her birth) and "the birthday rule" (a person attains a given age on the anniversary date of his or her birth). There is a split of authority across the country. The Court of Appeals chose the birthday rule and thus held that in accordance with *Miller* the defendant was not subject to *mandatory* LWOP. [Note: The prosecutor's application for leave to appeal is pending in the Supreme Court.]

Recent Michigan Supreme Court Decisions affecting the Sentencing Guidelines

Clarification of the standard of proof for scoring the sentencing guidelines & clarification of the standard of review on appeal:

Under the sentencing guidelines, scoring of the sentencing guidelines must be supported by a preponderance of the evidence and the circuit court's factual determinations are reviewed for clear error. *People v Hardy*, 494 Mich 430, 438 (2013). The so called "any evidence" standard does not govern review of a circuit court's factual findings for the purposes of assessing points under the sentencing guidelines. *Hardy* at 438 n 18.

The proper interpretation and application of the legislative sentencing guidelines are questions of law, which an appellate court reviews de novo. *People v Hardy*, 494 Mich 430, 438 (2013). Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. The abuse of discretion standard **only** applies under the sentencing guidelines when an appellate court reviews a circuit court's conclusion that there was a "substantial and compelling reason" to depart from the guidelines. *Hardy, supra* at 438, 438 n 17.

NOTE: Many Michigan Court of Appeals' decisions, prior to *Hardy, supra,* used the language that "Scoring decisions for which there is any evidence in support will be upheld". E.g., *People v Crews*, 299 Mich App 381 (2013); *People v Carrigan*, 297 Mich App 513, 514 (2012); *People v Harverson*, 291 Mich App 171 (2010); *People v Phelps*, 288 Mich App 123, 135 (2010); *People v Endres*, 269 Mich App 414, 417 (2006). The Michigan Supreme Court specifically rejected that formulation of the standard of review in *Hardy, supra* at 437-438, 438 n 18. See also, *People v Jones*, 494 Mich 880 (2013). **So some prior COA opinions on OV scoring may be vulnerable. In theory, going forward, it should be easier to win OV challenges on appeal.**

Some examples of remands for resentencing or reconsideration *post-Hardy* based on "new" standard of review:

- *People v Rhodes (After Remand)*, 305 Mich App 85 (2014)(following MSC remand for reconsideration of OV 14 challenge under the proper standards of review, the COA reversed and remanded for resentencing).

- *People v Marshall*, 495 Mich 983 (2014)(remand to COA for reconsideration under proper standards of review; multiple variables challenged).

- *People v Wilcox*, unpublished COA opinion, #310550, 11/26/13 (OV 10; resentencing granted).

Recent Michigan Supreme Court Leave Grants

Is Michigan subject to Alleyne?

Leave granted in *People v Lockridge*, ___ Mich ___; 846 NW2d 925 (2014). COA opinion can be found at 304 Mich App 278. COA answered no, relying on People v Herron, 303 Mich App 392 (2014), which held that *Allyene* does not apply to Michigan.

Legal background:

Recall that after *Blakely v Washington*, 546 US 296 (2004), Michigan's statutory sentencing guidelines scheme was held not to violate the Sixth Amendment, even though it allows a trial court to use judicially ascertained facts under a preponderance of the evidence standard to determine the scoring of the sentencing guidelines variables and for departure reasons. This is because Michigan largely uses an indeterminate sentencing scheme (a min term and a max term with parole board discretion as to release between the min and max). *People v Drohan*, 475 Mich. 140 (2006); *People v McCuller*, 475 Mich. 176 (2006), vacated and remanded, 549 US 1197 (2007), after remand 479 Mich 672 (2007); *People v Harper and Burns*, 479 Mich. 599 (2007). Essentially *Blakely* was about the maximum amount of time a defendant can be incarcerated and MI's sentencing guidelines are largely about the minimum amount of time a defendant can be incarcerated, so the courts found that *Blakely* did not apply to MI's guidelines system.

In *Alleyne v United States*, 570 US __; 133 S Ct 2151 (2013), the US Supreme Court went further, overruling *Harris v United States*, 536 US 545 (2002). The *Alleyne* Court held that any fact that increases a *mandatory minimum* term of sentence is an element of the crime that must be submitted to the jury and proven beyond a reasonable doubt. In Michigan, the question is whether our statutory sentencing guidelines ranges are the equivalent of a mandatory minimum and thus subject to the rule of *Alleyne*.

MSC lv grant order provides:

"The parties shall address: (1) whether a judge's determination of the appropriate sentencing guidelines range, MCL 777.1, et seq. , establishes a "mandatory minimum sentence," such that the facts used to score the offense variables must be admitted by the defendant or established beyond a reasonable doubt to the trier of fact, *Alleyne v. United States*, 570 U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); and (2) whether the fact that a judge may depart downward from the sentencing guidelines range for "substantial and compelling" reasons, MCL 769.34(3), prevents the sentencing guidelines from being a "mandatory minimum" under *Alleyne*, see *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)."

NOTE: Defense attorneys should preserve *Alleyne* objections to the scoring of the sentencing guidelines, at least where the facts underlying the scoring are in dispute and the jury verdict(s) does not specifically address the dispute.

Habitual Offender Enhancement

3-strikes law or Super Habitual (25-year mandatory minimum)

Effective October 1, 2012, the habitual offender – 4th statute was amended to provide for a mandatory minimum term of twenty-five years when the current sentencing conviction is a "serious" crime, and one of the three prior convictions is a "listed" felony offense. 2012 PA 319, amending MCL 769.12.

To qualify for the new 25-year mandatory minimum:

*The **CURRENT CONVICTION** must be a **"serious"** crime. The Legislature has classified the following crimes as "**serious**":* [MCL 769.12(6)(c)]

Murder - second degree
Manslaughter
AWIM
AGBH
Assault with intent to maim
Assault with intent to rob, unarmed
Assault with intent to rob, armed
Armed robbery
Carjacking
Kidnapping
Kidnapping, child under age 15
Prisoner taking hostage
Mayhem
CSC first-degree
CSC second-degree
CSC third-degree
Assault with intent to CSC 1st or 3rd
Conspiracy to commit any of these offenses

AND…

***One** of the **PRIOR CONVICTIONS** must have been a "listed" offense. The Legislature has classified the following offenses as "listed":* [MCL 769.12(6)(a)(i)-(iii)]

Murder, second degree
Manslaughter
Death, firearm pointed w/o malice
Felonious assault
AWIM
AGBH
Torture
Assault with intent to maim
Assault with intent to commit felony
Assault with intent to rob, unarmed
Assault with intent to rob, armed
Attempted murder
Solicitation to commit murder
Kidnapping
Kidnapping, child under age 15
Prisoner taking hostage
Mayhem
Aggravated stalking
Felony stalking, victim under age 18
Resisting and obstructing, death
Resisting and obstructing, serious impair.
CSC 1st, 2nd, or 3rd degree
Assault with intent to commit CSC
Armed robbery
Unarmed robbery
Carjacking
Rioting in state correctional facility
Any drug offense with max over four years
Home invasion 1st or 2nd degree
Child abuse 1st or 2nd degree
Vulnerable adult abuse 1st or 2nd degree
Assault of employee during escape
Fleeing and eluding first-degree (death)
Fleeing and eluding second-degree (injury)
Impaired driving causing death
Arson of dwelling
Carrying weapon unlawful intent
Carrying concealed weapon
Felony-firearm (second or subseq. offense)
Intentional discharge firearm at vehicle or a dwelling
Intentional discharge firearm at emerg. or law enforce. vehicle
Attempt to commit any of the above

Note: The three prior convictions must be based on offenses that did NOT occur during the same transaction. MCL 769.12(1)(a) (in effect reviving the old *Stoudemire* rule in this one particular setting).

Note: Application of the 25-year mandatory minimum term to an offense committed before the effective date of the law would constitute an ex post facto violation. *See Lindsey v Washington*, 301 US 397 (1937) (application of revised statute that earlier provided for 15 year max and one year minimum to new penalty of mandatory 15 years violates ex post facto clause); *United States v Moon*, 926 F 2d 204, 210 (CA 2, 1991) (application of mandatory minimum term to offense that occurred before requirement of mandatory minimum term violates ex post facto clause).

Caution: The DOC has begun sending letters to the sentencing judge regarding the 3-strikes/super habitual:

Reminder: The DOC is not a party in the criminal case. Any notices sent to the courts from the DOC concerning alleged sentencing errors are merely informational, and any requests contained within are merely advisory. Any judge receiving such a notice must ascertain the nature of the claimed error, determine whether the error implicates a defendant's sentence, and consider the curative action recommended by the DOC. It is imperative, however, that any corrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules. Significantly, if the claimed error is substantive in nature, the court may modify the sentence

only after giving the parties an opportunity to be heard and if it has not yet entered judgment in the case. MCR 6.435(B). Similarly, if the original judgment of sentence was valid when entered, MCR 6.429(A) controls and mandates that the court may not modify a valid sentence after it has been imposed except as provided by law. *People v Holder*, 483 Mich 168, 175-177 (2009). See also MCR 6.435(A)-(B)&(D).

Amendments to the Notice/Adequate Notice

The Michigan Supreme Court held that the defendant waived any error in the untimely amendment of the habitual offender notice back to habitual offender-4th (it had earlier been amended down to habitual offender-3rd during plea negotiations to try to induce an agreement) by repeatedly admitting his status as a fourth habitual offender. The Court affirmed the decision of the Court of Appeals, but vacated that portion of the decision discussing plain error as the plain error analysis was unnecessary to resolve the case. *People v Siterlet*, 495 Mich 919 (2013), modifying decision below 299 Mich App 180 (2012).

Where the defendant was given timely notice of his enhancement level and had sufficient prior convictions to support a fourth habitual enhancement, there was no miscarriage of justice when the trial court allowed the prosecution to amend the notice to correct the convictions or when it sentenced defendant as a fourth habitual offender. *People v Johnson*, 495 Mich 919 (2013).

The habitual offender notice was not untimely where it was filed with the felony information, even though the defendant was never arraigned on the information and apparently did not properly waive the arraignment. In the absence of an arraignment, the period for filing the habitual-offender notice is to be measured from the date the information charging the underlying offense is filed. *People v Marshall*, 298 Mich App 607 (2012), vacated in part on other grds 493 Mich 1020 (2013).

Recent Legislative Activity

Offense Variable 15: Effective March 19, 2014, there is a new 50 point category for individuals who come to Michigan from another state or country and have possession of a Schedule 1 or 2 drug with intent to deliver it. 2013 PA 2013, amending MCL 777.45.

Fleeing and Eluding: Effective January 1, 2013, fleeing and eluding first-degree moves from a Class C to Class B grid within the sentencing guidelines (but no change in penalty). Fleeing and eluding second-degree moves from a Class D to Class C grid (no change in penalty). 2012 PA 223, amending MCL 777.16x.

COPYING Child Sexual Abusive Material: Effective March 1, 2013, the act of copying child sexual abusive material moves from a four-year maximum penalty to a twenty-year maximum penalty. 2012 PA 583, amending MCL 750.145c.

Domestic Violence Third Offense: Effective April, 2013, the penalty for domestic violence third offense increases to "five years or a fine of not more than $5,000.00, or both." 2012 PA 336, amending MCL 750.81(4) (previous penalty was two years or $2,500 or both).

Likewise, a person who commits domestic violence causing serious or aggravated injury, and who has one or more prior domestic violence convictions, will face a penalty of "five years or a fine of not more than $5,000.00, or both." 2012 PA 336, amending MCL 750.81a(3) (previous penalty was two years or $2,500 or both).

Both crimes move from a Class G to a Class E within the sentencing guidelines. 2012 PA 365, amending MCL 777.16d.

Domestic Violence Diversion: Effective April 1, 2013, a discharge and dismissal under the domestic violence diversion statute, MCL 769.4a, may count as a prior "conviction" for purposes of the domestic violence recidivist statutes. 2012 PA 364, 550, amending MCL 769.4a(5).

SORA Reporting Requirements: Effective April 1, 2014, individuals must now report during the month of their birthday and interval that flow from that birthday month. 2013 PA 149, amending MCL 28.728a

Tier I:	Report Yearly During Birthday Month
Tier II:	Report Twice Yearly, Birthday Month and 6 Months Later
Tier III:	Report Quarterly, Birthday Month and 3 Month Intervals

Recent Sentencing Guidelines Scoring Decisions

General Reminders:

Michigan uses the preponderance of evidence standard of proof at sentencing. *People v Hardy*, 494 Mich 430 (2013); *People v Osantowski*, 481 Mich 103 (2008).

Many Court of Appeals' decisions, prior to the Supreme Court's recent clarification in *Hardy, supra*, used the language that "Scoring decisions for which there is any evidence in support will be upheld". E.g., *People v Crews*, 299 Mich App 381 (2013); *People v Carrigan*, 297 Mich App 513, 514 (2012); *People v Harverson*, 291 Mich App 171 (2010); *People v Phelps*, 288 Mich App 123, 135 (2010); *People v Endres*, 269 Mich App 414, 417 (2006). The Supreme Court specifically rejected that formulation of the standard of review in *Hardy, supra* at 437-438, 438 n 18. See also, *People v Jones*, 494 Mich 880 (2013). **Some appellate decisions concerning whether the scoring of a particular variable was justified will need to be re-examined in light of the rejection of the "any evidence" test.**

PRV 1 – Prior High Severity Convictions

In determining whether an out of state conviction constitutes a high or low severity felony conviction, the court must consider whether the conviction "corresponds" to a Michigan felony offense. The term "corresponds" refers to something that is "similar or analogous." Ohio's second-degree burglary statute corresponds to Michigan's second-degree *and* third degree home invasion statutes as the Ohio crime requires a trespass of a dwelling by force, stealth or deception, with intent to commit a criminal offense. While the Ohio statute does not specify whether the intended offense must be a felony or misdemeanor, and the Ohio statute punishes the crime with a maximum penalty of 8 years, the Court of Appeals concluded Ohio second-degree burglary most closely corresponds to Michigan's second-degree home invasion statute, thus making it a high-severity felony conviction. *People v Crews,* 299 Mich App 381 (2013).

PRV 2 – Prior Low Severity Convictions

The defendant's Indiana state conviction for receiving stolen property, i.e. a gun with a fair market value of $175, is properly scored as a prior low level felony conviction under Michigan's sentencing guidelines because though the monetary value would constitute misdemeanor receiving and concealing, under MCL 750.535(5), the more specific statute for receiving and concealing a stolen firearm, MCL 750.535b, which is a Class E felony, controls over the more general statute. *People v Meeks*, 293 Mich App 115 (2011).

PRV 5 - Prior Misdemeanors

Defendant's disorderly conduct convictions were not scorable offenses, but there was no error in scoring an Ohio conviction for "attempt to commit an offense" where the original charge involved a controlled substance and the Ohio statute treats attempted drug offenses in the same manner as the completed offense. The Court declined to rule on whether possession or illegal use of drug paraphernalia is a scorable offense. *People v Crews*, 299 Mich App 381 (2013).

Where the order of disposition for a juvenile illegal entry offense was not entered before the sentencing offense was committed, it was error to score this adjudication under PRV 5. *People v Gibbs*, 299 Mich App 473 (2013).

PRV 6 – Relationship to the Criminal Justice System

Five points may be scored under PRV 6 even though the defendant was technically not on probation, delayed sentence, or bond for a juvenile adjudication but he had been adjudicated and was awaiting disposition on the date of the sentencing offense. *People v Gibbs*, 299 Mich App 473 (2013)

PRV 7 – Concurrent or Subsequent Convictions

The Supreme Court vacated that portion of the Court of Appeals opinion that had held that it was proper to score PRV 7 for concurrent convictions that had been vacated by the trial judge on double jeopardy grounds, finding that it was unnecessary of the Court of Appeals to reach that issue as the defendant had waived it by asking the trial court to score it. *People v Lafountain*, 494 Mich 851 (2013). [Note: the Court of Appeals opinion was unpublished and had upheld the

scoring based in part on the any evidence standard that the Supreme Court rejected in *Hardy, supra*.]

OVs Generally

An offense designated within a particular crime class under the guidelines legislation, may not be counted or designated as a different crime class by the sentencing court for purposes of scoring the guidelines. *People v Bonilla-Machado,* 489 Mich 412 (2011)(it was error to consider assault of a prison employee, statutorily designated as a crime against public safety, as a crime against a person for purposes of scoring OV 13).

OV 1 – Aggravated Use of a Weapon

It was error to score OV 1 and OV 2 because the methamphetamine in this case was not used or possessed as a weapon. Remanded for resentencing. *People v Lutz*, 495 Mich 857 (2013). [Note: plea case; facts not readily available.]

The trial court committed plain legal error, entitling the defendant to resentencing on her conviction for delivery of methodone, in scoring OV 1 because the defendant did not use the methadone against her child as a weapon, as is required to score this variable. *People v Carr,* 489 Mich 855 (2011). [According to media reports, Carr was being monitored for drug use when she decided to use her daughter's urine to pass routine screenings and avoid being caught still using illegal drugs. Because Carr was prescribed methadone as a treatment for heroin addiction, she gave her daughter methadone so the girl's urine would test positive for that drug and fool the people conducting the tests.]

Delivery of heroin in a drug transaction will not ordinarily constitute the aggravated use of a weapon under OV 1 of the sentencing guidelines. Heroin is a harmful chemical substance and it can be used as a weapon. For example, one could forcibly inject heroin into an unwilling victim for the purpose of killing them by means of a heroin overdose. In such a case, we would have no difficulty in concluding that the heroin was used as a weapon as it was "used against an opponent, adversary, or victim." But that is not what happened here. There is no evidence that defendant forced the victim to ingest the heroin against his will. This was an ordinary, albeit illegal, consensual drug transaction. Defendant traded the heroin to the victim for something of value and thereafter the victim voluntarily ingested the heroin with tragic results, dying. But defendant did not attack the victim with the heroin. The heroin was not used as a weapon. Therefore, it is not appropriate to score OV 1 as if it were. Accordingly, the trial court must resentence defendant under properly scored sentencing guidelines, scoring OV 1 at zero points. *People v Ball,* 297 Mich App 121 (2012).

The Michigan Supreme Court reverses an assessment of points in the new *Crabtree* case, relying on *People v Ball, supra.* While the order in *Crabtree* does not mention the underlying facts, the unpublished decision of the Court of Appeals upheld an assessment of 20 points under OV 1 and 15 points under OV 2 where OMNI officers were exposed to harmful chemical substances in cleaning-up a meth lab. The order in *Crabtree*, which reverses that decision, appears to stand for the proposition that mere exposure to harmful chemical substances is not the same as *using* the substance as a weapon. *People v Crabtree,* 493 Mich 878 (2012), reversing unpublished decision of the Court of Appeals, issued March 20, 2012 (Docket No. 302583).

Where the weapon was concealed under the bedcovers at the time a search warrant was executed and drugs were found in the bedroom, and defendant was not home, it was error to score five points for an implied or displayed weapon under OV 1. *People v Nelson*, 491 Mich. 869 (2012).

OV 2 – Lethal Potential of Weapon Possessed or Used

See *Lutz, supra; Ball, supra*, and *Crabtree, supra.*

OV 3 – Degree of Physical Injury

The trial court properly scored ten points for injury requiring medical treatment where one victim lost part of his ear, resulting in four stitches, and another victim suffered whiplash and completed seven weeks of physical therapy. *People v Gibbs*, 299 Mich App 473 (2013).

The trial judge erred in scoring 0 points under OV 3 where the newborn child died and the sentencing offense was second-degree murder. In this situation, and in accordance with the case of *People v Houston*, 473 Mich 399 (2005), 25 points is the proper assessment where defendant caused the death of her baby. Defendant's conduct need not be the sole cause of death to score points under OV 3. *People v Portellos*, 298 Mich App 431 (2012).

First responders can qualify as victims under OV 3. (OV 3 does not specifically define the term "victim".) The trial court erred in declining to score OV 3 at 10 points where two firefighters were treated for injury sustained in responding to the arson of a dwelling house. The trial court had ruled that first responders were not "victims" of the criminal offense. *People v Fawaz*, 299 Mich App 55 (2012). [Likewise, the firefighters were "victims" for OV 9, under the specific definition of "victim" within that statute.]

Where the sentencing offense was first-degree home invasion and defendant's accomplice was fatally shot by the homeowner, 100 points may be scored for the death of a "victim" as the co-perpetrator was a victim of the defendant's criminal activity (even if shot by the homeowner). But the Court notes its conclusion that the co-perpetrator was a "victim" is limited to OV 3 and might not apply to other variables. *People v Laidler*, 491 Mich. 339 (2012).

The trial court correctly scored OV 3 at 10 points where the victim suffered an infection as a result of the sexual assault. *People v McDonald*, 293 Mich App 292 (2011).

OV 4 – Psychological Injury

There was no error in assessing 10 points for OV 4 where one victim testified the experience was traumatic and he had bad dreams, the other victim stated he no longer felt safe, and the third victim referred to the psychological impact of the crime at sentencing. *People v Gibbs*, 299 Mich App 473 (2013). [NOTE: **This holding may no longer be good law as it was based on the "any evidence" standard rejected by the Supreme Court in *Hardy, supra*.**]

The trial court did not err in scoring 10 points for OV 4 where the victim testified at trial she was nervous and scared during the bank robbery and she reported in her victim impact statement that she suffered sleeplessness for weeks afterward, that she "relived" the robbery every time she

closed her eyes, and she had a continuing fear of being robbed by her customers. *People v Earl*, 297 Mich App 104 (2012).

The victim's statements about feeling angry, hurt, violated, and frightened support the scoring of OV 4 at 10 points for this home invasion offense. The Court of Appeals noted that a trial court's scoring decision will be upheld if there is "any evidence" to support it. *Id*. at 124. *People v Williams*, 298 Mich App 121 (2012). [NOTE: An MSC application was not filed. **The holding may no longer be good law as it was based on the "any evidence" standard rejected by the Supreme Court in *Hardy, supra*.**]

The Court of Appeals finds error in the scoring of ten points under OV 4 where there was no record evidence of serious psychological injury resulting from the exhibition of a sexually explicit performance to a 12 year old girl. The trial court "may not simply assume that someone in the victim's position would have suffered psychological harm . . . ." *People v Lockett*, 295 Mich App 165 (2012). See also *People v Hicks*, 259 Mich. App. 518 (2003) (cannot assume serious psychological injury from forceful purse snatching).

OV 5 – Pysch Injury Sustained by Member of Victim's Family (Reminder: Homicide offenses only)

15 points were properly scored under **OV 5** for serious psychological injury to the victim's biological mother. The biological mother qualifies as "family" even though the victim was adopted as a child. And the evidence was sufficient where the biological mother suffered depression and a nervous breakdown after her son's death and she was taking more medication than before. *People v Davis*, 300 Mich App 502 (2013).

In a prosecutor's appeal, the Court of Appeals held that the trial court did not err in scoring zero points under OV 5 where the grandmother of the deceased newborn child submitted a sentencing letter that spoke about her disbelief, grief, anger and heartbreak over the loss of the baby, but there was no evidence either she or her husband necessarily required professional treatment. *People v Portellos*, 298 Mich App 431 (2012).

OV 6 – Offender's Attempt to Kill or Injure

The trial court did not err in scoring 50 points for OV 6 where the defendant was convicted of second-degree murder and first-degree home invasion by plea, because the killing was committed in the course of first-degree home invasion and also because the killing involved the murder of a peace officer. *People v Bowling*, 299 Mich App 552 (2013)[Note: Because the second-degree murder conviction was by plea, the instruction that the judge must score this variable consistant with the jury verdict absent information not disclosed to the jury did not come into play]

OV 7 – Aggravated Physical Abuse

Conduct designed to substantially increase the victim's fear and anxiety during the offense refers to 1) conduct "designed" for that purpose, meaning it was intended for that purpose, and 2) conduct "intended to make a victim's fear or anxiety greater by a considerable amount." The question is "whether the defendant engaged in conduct beyond the minimum necessary to

commit the crime, and whether it is more probable than not that such conduct was intended to make the victim's fear or anxiety increase by a considerable amount." The sentencing judge may consider conduct that is inherent in the crime (i.e., constitutes an element) for purposes of scoring OV 7 (although the Court notes there is language precluding this under OV 1, 3, 8, 11 and 13). The Court affirmed the assessment of 50 points in a case where the defendant pointed a shotgun, racked it and demanded the victim's possessions (Hardy), and where the defendant struck two employees in the head with a gun, knocked one down, and forced both behind the store counter during an armed robbery (Glenn). *People v Hardy*, 494 Mich 430 (2013).

Although the co-defendants engaged in a substantial beating of the victim, the conduct of the defendant who did not take part in or encourage others to participate in the beating was not sufficient to qualify as "sadism, torture, or excessive brutality" for purposes of scoring OV7 at 50 points. Moreover, unlike OV 1, OV 2, and OV 3, OV 7 does not state that "[i]n multiple offender cases, if 1 offender is assessed points for [the applicable behavior or result], all offenders shall be assessed the same number of points." For OV 7, only the defendant's actual participation should be scored. *People v Hunt*, 290 Mich App 317 (2010).

OV 8 – Victim Asportation/Captivity

OV 8 may be scored where the sentencing offense is unlawful imprisonment, rather than kidnapping. Fifteen points affirmed where defendant took store clerk into back conference room out of the public eye. *People v Kosik*, 302 Mich App 146 (2013).

Although defendant claimed the victim voluntarily entered the apartment with him and there was no further assault in the apartment, the trial court properly scored 15 points for asportation to a place of greater danger where the apartment was a more isolated location and the evidence suggested the victim did not feel free to go anywhere other than the apartment with the defendant after he had assaulted her in the driveway. *People v Dillard*, 303 Mich App 373 (2013).

OV 9 – Number of Victims

The trial court improperly scored OV 9 at 25 points for more than twenty victims of property loss where defendant pleaded guilty to vandalizing two school buildings. The community at large was not a direct victim of the crimes. "Under the trial court's broad interpretation, nearly every criminal offense could result in a score of 25 points for OV 9 because the community as a whole always indirectly suffers when a crime is committed." The only direct victim was the school district, and thus no points should be assessed under OV 9. *People v Carrigan*, 297 Mich App 513 (2012).

First responders who are placed in danger of injury can be counted under OV 9. *People v Fawaz*, 299 Mich App 55 (2012). [Firefighters injured while trying to put out a fire in an arson case.]

OV 9 was properly scored at 10 points for two or more victims where the codefendant fired multiple shots in a residential neighborhood, striking and killing one police officer, and where a at least one neighborhood resident was nearby when the codefendant fled out of the garage just moments before shooting the officer. *People v Bowling*, 299 Mich App 552 (2013).

In *People v Gratsch*, 299 Mich App 604 (2013), the Court of Appeals affirmed the trial court's scoring of OV 9 at 10 points for two victims where defendant was convicted of one count of possessing a weapon in jail and he had possessed the makeshift "needle" in the jail for several days, he threatened another inmate with injury if he told on one day, and he stated that he should stab a female corrections officer in the neck on another day. [NOTE: The defendant filed an application for leave to appeal in the Supreme Court. The Supreme Court vacated that portion of the Court of Appeals' opinion that cited the "any evidence" and "abuse of discretion" standards for scoring the guidelines, citing *Hardy, supra*, but the Supreme Court did not reverse and remand for resentencing. 495 Mich 876 (2013)]

OV 10 – Exploitation of a Victim's Vulnerability

A defendant convicted of possession of child pornography may be scored 10 points for exploitation of the victim's youth despite lack of contact with the child because the defendant nevertheless engages in systematic exploitation of a vulnerable victim. *People v Needham*, 299 Mich App 251 (2013).

Court affirms 15 points for predatory conduct where defendant investigated the store and waited until the victim was alone to strike, and the victim was vulnerable due to the circumstances – even though the victim was an adult, healthy, alert, sober and working during the afternoon in a fully lit store open to the public. *People v Kosik*, 302 Mich App 146 (2013).

Ten points may be scored where defendant took advantage of his greater strength, the victim's intoxication and the domestic relationship between the two including that they had a child together. *People v Dillard*, 303 Mich App 373 (2013).

The trial court erred in assessing points for OV10 in a case of embezzlement by an employee of a credit union because the defendant did not use abuse an authority status as that is defined in the statute. Defendant did use "fear or deference to an authority figure" to exploit the "victim" here. He simply was in a position to take the money and hide the transfers. The Court of Appeals also questioned whether a bank could be a "vulnerable" victim. *People v Brandt*, unpublished opinion of 01-28-10 (Court of Appeals #288466), lv den 489 Mich 875 (2011) after oral argument (Justice MJ Kelly questions whether an institution could ever be a vulnerable victim).

OV 11 – Criminal Sexual Penetration

Fifty points properly scored for two additional penetrations arising out of the sentencing offense where defendant was convicted of three counts of first-degree CSC for acts against teenager over a period of three years and victim stated nearly every encounter involved penile-vaginal penetration and also cunnilingus and fellatio. *People v Johnson*, 298 Mich App 128 (2012).

OV 12 – Number of Contemporaneous Felonious Criminal Acts

Where the defendant pled guilty to one count of possessing child sexually abusive material and one count of using a computer to commit a crime and where he had had continuing possession of four disks containing over 100 images of child pornography, the trial court properly scored 25 points under OV 12 for three or more contemporaneous felonious acts that would not result in conviction. The one conviction for possession of child sexually abusive material, a crime against

a person, constituted the sentencing offense, but whether it was possession of each individual image or possession of each individual disk there were at least 3 other crimes against the person within a period of 24 hours that were not going to result in conviction. *People v Loper*, 299 Mich App 451 (2013).

In a case of robbery which occurred inside of a grocery store, the trial court erred in assessing points under OV12 for either a larceny from a person (necessarily included lesser) or larceny in a building (cognate) because the defendant's act of wrongfully taking the victim's money was a single act and the robbery subsumes the larceny whether it was inside a building or not. The Legislature clearly intended for contemporaneous felonious acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense. *People v Light*, 290 Mich App 717 (2010). [Note: It was okay to score the act of carrying a concealed weapon.]

The trial court erred in assessing 25 points for OV12 reflecting 3 contemporaneous felonious acts within 24 hours involving crimes against a person on the basis of charges of disseminating sexually explicit matter to a minor, because those offenses are designated as crimes against public order. *People v Wiggins*, 289 Mich App 126 (2010).

All conduct that can be scored under OV 12 must be scored under that offense variable before proceeding to score OV 13. The trial court erred when it concluded it could score the conduct at issue under the variable yielding the highest total points. *People v Bemer*, 286 Mich App 26 (2009).

OV 13 – Continuing Pattern of Criminal Behavior

Nothing precludes scoring OV 13 for multiple convictions arising out of the same incident. *People v Gibbs*, 299 Mich App 473 (2013).

OV 13 is not a *McGraw* variable [*People v McGraw*, 484 Mich. 120 (2009)] as it expressly allows consideration of conduct going beyond the sentencing offense. The trial court did not err in considering an earlier dismissed charge of felonious assault (defendant pled guilty to felon in possession in return for dismissal of the felonious assault charge) where defendant admitted he aimed a rifle at his cousin following an argument. *People v Nix*, 301 Mich App 195 (2013).

An offense designated within a particular crime class under the guidelines legislation, may not be counted or designated as a different crime class by the sentencing court for purposes of scoring the guidelines. *People v Bonilla-Machado*, 489 Mich 412 (2011)(it was error to consider assault of a prison employee, statutorily designated as a crime against public safety, as a crime against a person for purposes of scoring OV 13).

Conspiracy is a crime against public safety and cannot be counted under OV 13 as a crime against the person by looking at the nature of the underlying offense. *People v Pearson*, 490 Mich 984 (2012). [NOTE**:** Abrogating *People v Jackson*, 291 Mich App 644 (2011), which had held the opposite.]

No error in using dismissed 2008 bank robbery charge towards the scoring of OV13 where presentence report indicated defendant was identified by a parole agent for this offense and

prosecutor presented a surveillance photo as further evidence. *People v Earl*, 297 Mich App 104 (2012)

OV 14 – Leadership Role

The trial court properly scored 10 points for a leadership role despite defendant's complaint that he was the only one charged with a crime as the Court of Appeals defines "multiple offender situation" as a situation consisting of more than one person violating the law while part of a group, and in this case there was another individual with the defendant who was also violating the law. It is not required that a criminal charge be filed against the other individual. *People v Jones*, 299 Mich App 284 (2013). [NOTE: The defendant filed an application for leave to appeal in the Supreme Court. The Supreme Court vacated that portion of the Court of Appeals' opinion that cited the "any evidence" and "abuse of discretion" standards for scoring the guidelines, citing *Hardy, supra*, but the Supreme Court did not reverse and remand for resentencing. 494 Mich 880 (2013)]

The trial court did not err in scoring 10 points against defendant Henderson where Henderson perpetrated the offense with a gun, did most of the talking, gave orders to co-defendant Gibbs, and checked to make sure Gibbs took everything of value. *People v Gibbs*, 299 Mich App 473 (2013).

OV 15 – Aggravated Controlled Substance Offenses

OV15 is a *McGraw* variable (*People v McGraw*, 484 Mich. 120 (2009), i.e. the scoring is specific to conduct relating to the sentencing offense. Where defendant was convicted of possession with intent to deliver less than 50 grams of cocaine for less than a gram of cocaine found in his car, and the prosecutor dismissed a higher charge of possession with intent to deliver over 50 grams for 64 grams of cocaine found in a nearby motel room, it was error to score 50 points for the cocaine found in a motel room even if the two offenses occurred simultaneously. *People v Gray*, 297 Mich App 22 (2012).

OV 16 – Property Obtained, Damaged, Lost, or Destroyed

OV 16 may not be scored for defendant's failure to pay child support where the defendant was unemployed and unable to pay. The legislature intended that the variable be scored where tangible property that was already possessed by a person is unlawfully obtained by the offender; likewise the language "lost" under this variable refers to something already possessed rather than a failure to fulfill the victim's legal expectation of receiving child support. *People v Hershey*, 303 Mich App 330 (2013).

OV 19 – Threat to Security or Interference with the Administration of Justice

OV 19 may not be scored for a failure to pay child support or a violation of probation. The language "interfere with the administration of justice" refers to "[o]pposing so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process" and did not apply here where defendant's failure to pay child support occurred after the circuit court ordered child support and the probation violation occurred after the

defendant had been sentenced and placed on probation. *People v Hershey*, 303 Mich App 330 (2013).

Ten points properly scored under OV 19 where defendant fled on foot after police ordered him to "freeze." *People v Ratcliff*, 299 Mich App 625 (2013).

In a prosecutor's appeal, the Court of Appeals held that the trial judge did no err in scoring zero points under OV 19. The People wanted it scored at 10 points on the basis that the defendant had lied to medical personnel thus interfering with emergency services, but that portion of the statute (the 10 point category), in contrast with other portions, does not include emergency services. The People also argued that OV 19 should be scored at 10 points because the defendant gave a false statement to the police, but the trial court declined to score it where defendant was in post-op recovery suffering the effects of anesthesia when she gave the statement *People v Portellos*, 298 Mich App 431 (2012).

REMINDER: Because OV19 expressly includes events occurring after completion of the sentencing offense, the exception to the general rule set for in *People v McGraw*, 484 Mich 120 (2009) applies and OV19 may be scored for conduct occurring after completion of the sentencing offense. *People v Smith*, 488 Mich 193 (2010) [witness intimidation conduct].

Recent Departure Decisions

Where the trial court continued probation following a probation violation and did not revoke probation, the court was not required to follow the sentencing guidelines range or provide reasons for what amounted to a downward departure (note, the original sentence was also a downward departure imposed pursuant to a plea bargain). *People v Malinowski*, 301 Mich App 182 (2013).

The trial court properly relied on defendant's strong family and community support, her age (30), lack of prior record, steady and exemplary work history, cooperation with the police and the fact that she was learned disabled and did not make good decisions under pressure. *People v Portellos*, 298 Mich App 431 (2012).

The trial court improperly departed where it imposed a jail sentence of 363 days (with probation) to avoid deportation consequences for a lawful resident alien of Turkish heritage who faced ethnic persecution in his home country, but the trial court was mistaken as to federal immigration law. *People v Akhemdov*, 297 Mich App 745 (2012).

Error to depart based on belief defendant terrorized his parents through arson of dwelling where trial court could have scored 50 points under OV 7 and did not do so and did not explain why a score under this variable would have been inadequate. Moreover, the trial court erred in departing based on the subjective conclusion defendant could have done more to assist his parents after the fire started. But departure was upheld where the trial court properly relied on the planning defendant engaged in, the extreme nature of the victims' injuries, the unusual level of psychological trauma caused by the familial nature of the relationship between victims and the defendant, and the defendant's pattern of escalating violence and his inability to benefit from counseling. *People v Anderson*, 298 Mich App 178 (2012).

The Court of Appeals held that a life sentence was disproportionately severe where the sentencing guidelines recommended a range of 9 to 46 months and defendant was convicted of entry without breaking with intent to commit larceny, a Class E offense, as a fourth habitual offender. The Court of Appeals agreed that some departure would be warranted based on the defendant's criminal history and recidivist tendencies where he had 12 prior felony convictions and rapidly committed new offenses upon release from prison for the prior offenses. But a life sentence under the guidelines is generally reserved for murder convictions and for Class A offenses with the highest OV and PRV scores. Here, the life sentence was improperly imposed for what amounted to trespassing. *People v Brooks*, 293 Mich App 525 (2011). The Michigan Supreme Court vacated this portion of the COA opinion as dicta, where the defendant had been granted a new trial, but it also noted that the extent of such a departure may be challenged. 490 Mich 993 (2012).

Delayed Sentences under MCL 771.1(2)

In *People v* Smith, __ Mich __ (Docket # 147187, June 18, 2014), the Supreme Court held that the plain language of MCL 771.1(2) does not deprive a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence. The Supreme Court overruled the Court of Appeals decisions in *People v McLott*, *People v Turner*, *People v Dubis*, and *People v Boynton* to the extent they hold otherwise. Here, over the prosecutor's objection, the circuit court delayed the defendant's sentence for one year plus one day out of its desire to lose jurisdiction over the case so that the defendant would not have a criminal record. Precisely one year and one day later, on the date set for sentencing, again over the prosecutor's objection, the court refused to sentence defendant and dismissed the case entirely, citing its lack of jurisdiction. The Supreme Court reversed the trial court's dismissal of the case, reinstated defendant's conviction, and remand to the Wayne County Circuit Court for sentencing before a different judge. The Supreme Court explained that it was not ruling that there were no limitations on a trial court's ability to delay the imposition of sentence, noting that the defendant has the right to be sentenced within a reasonably prompt time as part of his right to a speedy trial.

Special Sentencing Concerns in Plea Cases

Effective January 1, 2014, MCR. 6.302(C)(1) requires that the terms of any plea agreement, including any sentencing terms, must be placed on the record orally or be reduced to writing and signed by the parties. Any written agreement is to be made part of the court file.

Effective January 1, 2014, the amendments of MCR 6.302 and MCR 6.310 eliminate the ability of a defendant to withdraw a plea if the defendant and prosecutor agree that the prosecutor will "recommend" a particular sentence, but the court chooses to impose a sentence greater than that "recommended" by the prosecutor. Thus, Michigan law now will treat sentence "agreements" and sentence "recommendations" differently.

The defendant's challenge to the scoring of several offense variables was not waived by the prosecutor's agreement to recommend a sentence within a guidelines range of 42 to 70 months where defendant did not agree to a specific minimum sentence range of 42 to 70 months. *People v Osborne,* 494 Mich 861 (2013).

The trial court does not have the authority to vacate the plea at the time of sentencing when it disagrees with a sentence recommendation or sentence agreement. Instead, the correct remedy is to offer plea withdrawal to the defendant pursuant to MCR 6.310(B)(2) (or extend the same to the prosecutor when the prosecutor is the aggrieved party, see People v Siebert, 450 Mich 500 (1995)). To the extent that MCR 6.310(B)(2) conflicts with the decision in People v Grove, 455 Mich 439 (1997) – which decision allowed the judge to reject the plea itself - the Grove decision has been superseded by court rule. *People v Franklin,* 491 Mich 916 (2012).

Post - *Lafler v Cooper*[2] decision in MI

Although during the plea-bargaining process counsel indisputably misadvised the defendant of the consequences he faced if convicted at trial, the trial court did not reversibly err in determining that the defendant has not shown prejudice as a result of counsel's deficient performance. Under the facts of this case, the trial court did not err in finding that the defendant had not met his burden of showing a reasonable probability that but for counsel's erroneous advice he would have accepted the plea offer. The defendant's convictions were reversed and the matter remanded for new trial on other grounds. But the prosecutor will not be obligated to offer the same or any plea bargain. *People v Douglas,* ___ Mich ___ (Docket # 145646, July 11, 2014)

In *People v McCauley*, 493 Mich 872 (2012), the Supreme Court reversed the judgment of the Court of Appeals, vacated the judgment of sentence, and remanded the case to the trial court for consideration of an appropriate remedy in light of *Lafler v Cooper*. The trial court did not clearly err in concluding that defense counsel was ineffective, and if the defendant had been properly advised of the prosecutor's aiding and abetting theory, that there was a reasonable probability that the defendant would have accepted the prosecutor's plea offer. "On remand, the prosecutor shall reoffer the plea proposal, and once this has occurred, the trial court 'may exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.' Lafler, 566 U.S. at ——, 132 S.Ct. at 1389. In exercising that discretion, the trial court may consider the defendant's willingness to accept responsibility for his actions, and it may also consider any information concerning the crime that was discovered after the plea offer was made to fashion a remedy that does not require the prosecution to incur the expense of conducting a new trial. Id. at ——, 132 S.Ct. at 1389."

[2] 566 US ___; 132 S Ct 1376 (2012)

Recent Economic Assessment Decisions

Court Costs:

In *People v Cunningham*, ___ Mich ___ (June 18, 2014), the Michigan Supreme Court held that there is no authority for a circuit court to assess court costs or other fees not specifically provided for by the offense statute or other applicable statute. The Supreme Court overruled *People v Sanders*, 269 Mich App 710 (2012) and *People v Sanders (After Remand)*, 298 Mich App 105 (2012). The Supreme Court held that neither MCL 769.1k nor MCL 769.34(6) give circuit courts a general or blanket authority to assess court costs and other fees that are not separately authorized by another statute. [NOTE: There is already a legislative "fix" in the works.]

Restitution:

In *People v McKinley*, __ Mich __ (Docket #147391, June 26, 2014), in a 6-1 decision, the Supreme Court held that a trial court's restitution award that is based on conduct for which the defendant was not charged may not be sustained. *People v Gahan*, 456 Mich. 264 (1997), was overruled to the extent it held that MCL 780.766(2) authorizes the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction. The *McKinley* court held that the plain language of the statute authorizes the assessment of full restitution only for a victim of the defendant's course of conduct that gave rise to the conviction. The statute ties the defendant's course of conduct to the offenses for which the defendant was convicted and requires a causal link between them. For purposes of the opinion, "the phrase 'uncharged conduct' refers to criminal conduct that the defendant allegedly engaged in that was not relied on as a basis for any criminal charge and therefore was not proved beyond a reasonable doubt to a trier of fact." The court vacated the portion of the judgment of sentence ordering that the defendant pay $158,180.44 in restitution, and remanded to the trial court for entry of an order assessing $63,749.44 in restitution against the defendant.

The Crime Victim's Rights Act (CVRA) and the general restitution statute authorize courts to order a defendant to pay restitution for the reasonable travel expenses that victims incurred while securing their stolen property and attending restitution hearings; although statutes did not mention victims' travel expenses, statutes required "full restitution," and enumerated list of items to be included in restitution was not exhaustive. *People v Garrison*, 495 Mich 362 (5/29/2014)

The Michigan Rules of Evidence do not apply to restitution hearings. Evidence supported restitution in the amount of $4,580 for gas-oil separator damaged by defendant. *People v Matzke*, 303 Mich App 281 (2013). [**CAUTION:** The Supreme Court was holding the defendant's application for leave to appeal in abeyance pending the outcome in *People v McKinley, supra*.]

Where the restitution statute, here MCL 780.766(5), allows the trial judge to triple the restitution award where there is death or serious impairment of a bodily function, the trial court did not err in ordering triple restitution. *People v Lloyd*, 301 Mich App 95 (2013).

The trial court erred in refusing to order restitution for the insurance company's losses due to the investigation of defendant's arson offense. "[A] corporate victim is entitled to costs associated with investigating a defendant's illegal activity." But there was no error in refusing legal and court reporter fees in connection with defendant's deposition by the insurance company as the prosecutor failed to show these fees were investigatory as opposed to the costs associated with the insurance company's defense of a civil lawsuit. *People v Fawaz*, 299 Mich App 55 (2012).

The trial court did not clearly err in ordering restitution to Blue Cross Blue Shield for the loss of its investigator's time that was spent investigating defendant's prescription fraud activities even if the BSBS investigator was a salaried employee and Blue Cross would have incurred the cost of the investigator's salary regardless of the defendant's misconduct. *People v Allen*, 295 Mich App 277 (2012).

The trial court has no authority to order payment of one-third of the restitution prior to the defendant's release on parole. *People v Gosslein*, 493 Mich 900 (2012).

Crime Victims Rights fee:

The assessment against defendants called for in the Crime Victim's Rights Act was intended as a civil remedy rather than punishment. Thus retroactive application of an amended provision that increased the amount of the assessment for defendants convicted of a felony from $60 to $130 did not violate the constitutional prohibition against ex post facto laws. *People v Earl*, 495 Mich 33 (2014).

Recent DOC Activity (COMPAS)

COMPAS and so called "Evidence Based" Sentencing

In 2004, the Department of Corrections ("DOC") began using a statistically based instrument known as the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS"), developed by a private for-profit company. COMPAS, like all such so-called "evidence based" instruments, is supposed to assess many risk and needs factors in adult correctional populations and probationers in order to provide decision-support information regarding programming and the placement of offenders in the community. As one element of the DOC's prisoner re-entry initiative program, an initial COMPAS assessment is done for incoming prisoners and the results are used to develop a case plan. Currently, COMPAS is most often used to determine programming needs for incoming prisoners. COMPAS scores are available to the Parole and Commutation Board at the time of parole consideration (though the parole interview is still driven by the parole guidelines) and may also play a role in parole supervision. COMPAS is also being utilized for probationers in some counties.

Relatively recently, the DOC initiated pilot programs before a few judges in a few counties to have COMPAS assessments administered by DOC field agents at the time of preparing the Presentence Information Report ("PSI") and to include the results and in some cases the underlying data within the PSI for consideration by the sentencing judge in fashioning the sentence to be imposed upon the defendant.

The DOC then indicated its intent to expand the pilot program to eventually include all felony sentencings as soon as Summer 2014. Currently the DOC has pushed back the date for expanding the use of COMPAS into all PSIs for felony sentencing to an undetermined date in 2014.

Concerns regarding Reliability, Constitutionality, and Individualized Sentencing

There is a good argument that risk-assessment tools like COMPAS are insufficiently reliable to be used at sentencing because they have a high rate of error, including a high false positive error rate. The literature of the company that developed it posits that COMPAS has an accuracy rate of between .64 and .80, depending on the model used and the groups selected for review.[3] This correlates with an error rate of somewhere between 20% and 36%.[4] In other words, COMPAS results may be wrong anywhere from one in three to one in five times. The lowest accuracy rate of .64 was for predictions of *any* future offense (not simply a felony or offense against the person) by African American men.[5] The Michigan Court of Appeals recently questioned the reliability of COMPAS and another risk-assessment instrument, VASOR, even for use in parole decisions. *Macomb County Prosecutor v Michigan Parole Board and Craig Cehaich*, unpublished per curiam opinion of the Court of Appeals, docket no. 312386, decided October 1, 2013, p 5.

The unreliability of risk assessment predictions makes the use of these instruments at sentencing akin to consideration of polygraph results, which is forbidden in Michigan. When the admissibility of polygraph results was first considered by the Michigan Supreme Court, it was noted that lie-detector tests had an estimated error rate of 10% to 25%.[6] Because there was no general scientific recognition of lie detector tests and "no reasonable certainly [that] follows from such tests," polygraph results were not allowed at trial.[7] The Court of Appeals later extended this rule to the sentencing proceeding out of concerns for the reliability or accuracy of information considered by the sentencing judge.[8]

Another underlying concern with risk assessment instruments is that they provide information as to group recidivism rates and group characteristics, but not individual human behavior. Risk assessment instruments do not quantify the risk that a particular offender, rather

[3] Brennan, Dieterick, & Ehret, *Evaluating the Predictive Validity of the COMPAS Risk and Needs Assessment System*, 36 Criminal Justice and Behavior 21, 30-31 (2009).

[4] Id. at 30.

[5] Id. at 31.

[6] *People v Davis*, 343 Mich 348, 370 (1955). *See also, People v Dockery*, 65 Mich App 600 (1975) (noting newer estimates of 10% error rate).

[7] *People v Davis*, 343 at 370-371 (quoting *People v Becker*, 300 Mich 562, 566 (1942)).

[8] *People v Allen*, 49 Mich App 148, 151-152 (1973); s*ee also People v Dockery*, 65 Mich App 600 (1975).

than the group he or she falls within, will re-offend.[9] People do not choose to be born to criminal or non-criminal parents, to be raised in a high income or high crime neighborhood, or to have high IQ scores or learning disabilities. Michigan has a strong tradition of individualized sentencing, not sentencing based on what group a defendant belongs to, and the use of risk assessment instruments such as COMPAS undermines individualized sentencing.[10]

One group for which taking group recidivism rates and group characteristics into account may be particularly problematic is young offenders.[11] Youth correlates with recidivism.[12] Additionally, age might count against a defendant's COMPAS assessment in other more subtle ways. COMPAS takes into consideration a defendant's employment history and educational or vocational training. Presumably, young defendants are more likely to be unemployed and less likely to have a well-developed employment history and demonstrated skill set. Furthermore, they may score poorly on the many COMPAS questions that implicate socialization, interpersonal relationships, and leisure time, because young offenders are on average developmentally less mature. COMPAS, like other risk assessment tools, may count people's youth against them instead of reflecting the belief that young offenders deserve special tolerance or solicitude. As such, taking COMPAS results into consideration at sentencing is contrary to the U.S. Supreme Court's reasoning in its recent *Miller v. Alabama* decision.[13] In *Miller*, the Supreme Court noted that "[y]outh matters" when imposing the most serious sentences. *Miller*, 132 S. Ct. at 2471. Youths lack maturity and have an undeveloped sense of responsibility, they are more vulnerable to negative influences and peer pressure, their character traits are less fixed, and they have greater prospects for reformation. 132 S. Ct. at 2464. Moreover, they have limited control over their environment and "lack the ability to extricate themselves from horrific, crime-producing settings." *Id.*

COMPAS, like every other risk assessment instrument in general use, does not consider race directly.[14] Nevertheless, many of its factors may closely overlap with race, and thus may render it unconstitutional. For example, COMPAS takes into consideration whether the offender lives in a "high crime neighborhood."[15] Because in many cities neighborhood of residence correlates near perfectly with race, this factor — at least in those geographic locations — operates as a proxy for race. If, in practice, it appears that there are real disparities in COMPAS risk scores based on race and that these scores impact the sentencing process, there may be a ripe equal protection (disparate impact) challenge.

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[9] Fond & Winick, *Symposium: Sex Offender Reentry Courts: A Proposal for Managing the Risk of Returning Sex Offenders to the Community*, 34 Seton Hall L Rev 1173, 1179-1180 (2004).

[10] See *People v. McFarlin*, 389 Mich. 557, 574 (1973); *People v. Gjidoda*, 140 Mich. App. 294 (1985); *People v. Milbourn*, 435 Mich. 630 (1990).

[11] There will be a separate and comprehensive version of COMPAS for offenders under 18.

[12] *See, e.g.*, Paul Gendreau et al., *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!* 34 Criminology 57, 576 (1996).

[13] *Miller v. Alabama*, 567 U.S. __; 132 S. Ct. 2455; 183 L. Ed. 2d. 407 (2012).

[14] Oleson, *supra* note 57, at 9.

[15] Note also that "having criminal companions" is broadly thought to be the strongest single predictor of recidivism. *See* Gendreau, et al., *supra* note 52, at 583.

COMPAS does directly consider gender. It appears that male defendants will, due to gender alone, be assigned a higher risk score than an otherwise-identical woman. As Prof. Sonja B. Starr, explains in *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination* (2014), the US Supreme Court has rejected defenses of gender classifications that are grounded in statistical generalizations about groups. In *Craig v. Boren*, 429 US 190 (1976), for instance, the Court considered struck down a law subjecting men to a higher drinking age for certain alcoholic beverages than women. The state had defended the law with statistical evidence, including a study showing that young men were arrested for drunk driving at more than ten times the rate of young women (2% versus 0.18%). The Court noted that "prior cases have consistently rejected the use of sex as a decision making factor even though the statutes in question certainly rested on far more predictive empirical relationships than this." Inferring an individual tendency from group statistics regarding gender differences is generally prohibited. Equal protection means that individuals are neither entitled to favorable treatment nor unfavorable treatment due to statistical generalizations based on gender.

The use of socio-economic factors in COMPAS is also constitutionally suspect. As Prof. Sonja B. Starr, explains in *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination* (2014), the most on-point U.S. Supreme Court case in this regard is *Bearden v. Georgia*, 461 US 660 (1983), in which the district court had revoked the probation of an indigent defendant who had been unable to pay his court-ordered restitution. The Supreme Court unanimously reversed, holding that incarcerating a defendant merely because he was unable to pay amounted to unconstitutional wealth-based discrimination. Importantly, the Court in *Bearden* squarely rejected the state's argument that poverty was a recidivism risk factor that justified additional punishment. "[The state's argument] is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated." *Bearden*, at 671. The Court's resistance to "lumping [the defendant] together with other poor persons" is very similar to its reasoning concerning statistical discrimination in the gender cases. The Court observed that the state had cited "several empirical studies suggesting a correlation between poverty and crime," but it was not persuaded by this appeal to a statistical generalization.

U.S. Attorney General Eric Holder has very recently voiced his concern over the spread of the use of these instruments at sentencing because they can have a disparate and adverse impact on the poor, on socially disadvantaged offenders, and on minorities. http://time.com/#3061893/holder-to-oppose-data-driven-sentencing/ The use of such instruments at sentencing could further widen the disparity between sentences for the privileged and the underclasses - - think of the recent *affluenza* defense and the Dupont heir who had his prison sentence for raping a child suspended because the judge believed that he "would not fare well" in prison. http://www.cnn.com/2014/02/05/us/texas-affluenza-teen/; http://www.cnn.com/2014/04/02/justice/delaware-du-pont-rape-case/

Presentence Reports

Contents

MCL 771.14, MCR 6.425(A), and MDOC Policy Directive 06.01.140 describe what is to be included in the Presentence Report.

Correction

MCR 6.425(E)(2) provides:

> If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determined that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge **or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to:**
>
> (a) correct or delete the challenged information in the report, whichever is appropriate, and
> (b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

The trial court did not abuse its discretion in rejecting the defendant's challenge to the victim impact statement in the presentence report that claimed the victim suffered an injury to his arm while attempting to apprehend the defendant, where the trial judge concluded the statement was the victim's subjective recollection of what happened. Moreover, the presentence report properly included the agent's subjective opinion that the defendant was "casing" houses on the night of the instant offense (as conclusions drawn from the facts may not be challenged). Finally, the defendant did not present an "effective challenge" to information contained in the report where the defendant merely claimed that the police officer failed to identify himself at the time of the offense, but did not support this challenge. *People v Lucey*, 287 Mich App 267 (2010).

When a defendant challenges the accuracy or relevancy of information in the presentence report, the trial court must respond. The trial court did not abuse its discretion in retaining a statement in the report that the defendant was "uncooperative and refused to answer questions" where this was the opinion of the presentence investigator. *People v Waclawski*, 286 Mich App 634 (2009).

Where the defendant requested a number of corrections to the presentence report and the court indicated that several of the changes would be made but were not, on remand the circuit court shall assure that a corrected copy of the report is prepared and transmitted to the MDOC pursuant to MCR. 6.425. *People v Webber*, 483 Mich 915 (2009).

The trial court erred in refusing to evaluate the defendant's post-sentencing objection to the accuracy of information in the presentence report because a challenge to the presentence report may be brought at sentencing, in a proper motion for resentencing, or in a proper motion to remand. *People v Lloyd*, 284 Mich App 703 (2009).